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IN THE

Supreme Court of the United States

October Term, 1984

S. SIMCHA GOLDMAN,

Petitioner,

v.

CASPER W. WEINBERGER, Secretary of Defense, *et al.*,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF, THE SYNAGOGUE COUNCIL OF AMERICA AND THE AMERICAN CIVIL LIBERTIES UNION

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INTEREST OF THE AMICI

The American Jewish Congress is an organization of American Jews founded in 1918 to protect the civil, economic and political rights of American Jews and all Americans. It is committed to the preservation of the great freedoms secured by the First Amendment to the Constitution, especially the rights secured by the Establishment and Free Exercise clauses. To further these ends, AJCongress has filed briefs amicus curiae in numerous cases in state and federal courts in which the meaning of the religion clauses has been at issue.

As an organization representing a religious minority, AJCongress is concerned that the power of government not be used arbitrarily to suppress easily accommodated free exercise of religion. In particular, AJCongress seeks to ensure that the patriotic desires of Orthodox Jews to serve their

country in the Armed Forces are not thwarted without compelling reasons.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Central Conference of American Rabbis, representing the Reform rabbinate;

Rabbinical Assembly, representing the Conservative rabbinate;

Rabbinical Council of America, representing the Orthodox rabbinate;

Union of American Hebrew Congregations, representing the Reform congregations;

Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;

United Synagogues of America, representing the Conservative congregations.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members. It was founded over 60 years ago and is dedicated to defending and preserving the principles embodied in the Bill of Rights. The ACLU has been involved in many of the leading First Amendment cases in which Free Exercise rights have been threatened.

This case pits a fundamental constitutional right -- free exercise of religion -- against the government interest in military discipline. The particular issue it raises is whether the right of an Air Force Captain to exercise his religion by unobtrusively covering his head while indoors is outweighed by the Air Force's asserted need for strict adherence to arbitrary regulations forbidding such headcovering. The broader issue it raises is whether an Orthodox Jew who wishes to serve his country is unwelcome in the Air Force.

This brief is submitted with the consent of the parties.

STATEMENT OF THE CASE

Facts

Since 1970, petitioner S. Simcha Goldman, an Orthodox Jew, has served his country with distinction. First, after receiving his rabbinical ordination, he served as a Navy chaplain. Later, after completing a Ph.D degree in clinical psychology, he entered active duty in the Air Force as a captain and was assigned to the Mental Health Clinic at the March Air Force Base Hospital in California. Throughout his military service, Goldman consistently received outstanding evaluations from his superiors. Goldman v. Secretary of Defense, 734 F.2d 1531, 1532-33 (D.C. Cir. 1984).

In accordance with Orthodox Jewish law, Goldman has, since boyhood, kept his head covered at all times. During his Air

Force Service, Goldman, when outdoors, wore the regulation Air Force cap; when indoors, he wore a "yarmulke," a small cloth skullcap.* For the first three and one half years of his Air Force service, Goldman's yarmulke never occasioned any complaints or suggestions that his unobtrusive addition to the normal Air Force uniform was improper, or affected anyone's performance in any way.

In May 1981, however, Goldman's superior officer told him that wearing a yarmulke indoors, while in uniform, violated Air Force Regulation 35-10 §1-6(h) (2)(f)** ["AFR 35-10"] and he ordered Goldman to re-

* For Orthodox Jews, the wearing of a "yarmulke" (a word of Yiddish origin) is a sign of allegiance to the Jewish religion. There is no dispute as to the bona fides of Goldman's religious belief. See Goldman, 734 F.2d at 1537; Brief of Solicitor General In Opposition to Petitioner for Writ of Certiorari at 4-13, Goldman v. Weinberger.

** AFR 35-10 §1-6(h)(2)(f) requires that "headgear will not be worn...[w]hile indoors except by armed security personnel in the performance of their duties."

move it, or face court-martial. This litigation ensued.

Proceedings Below

In July 1981, Goldman filed this suit for injunctive relief and damages challenging AFR 35-10 as a restraint on his First Amendment free exercise rights. After a hearing that was consolidated with a trial on the merits, the district court granted Goldman injunctive relief.

On appeal, the U.S. Court of Appeals for the District of Columbia Circuit reversed. Goldman v. Secretary of Defense, 734 F.2d 1531 (D.C. Cir. 1984). The Court of Appeals relied on Rostker v. Goldberg, 453 U.S. 57 (1981) as setting the standard of review for evaluating Goldman's Free Exercise claim against the government's power to enforce military regulations.. The Court of Appeals held that the "peculiar nature of the Air Force's interest in uniformity" per-

mits strict enforcement of regulations prohibiting any headcovering indoors, even though, the Court of Appeals conceded, those regulations "are arbitrary." Goldman, supra, 734 F.2d at 1540.

. Goldman petitioned the Court of Appeals for rehearing en banc, which the Court of Appeals denied, Goldman v. Secretary of Defense, 739 F.2d 657 (D.C. Cir. 1984). Three Circuit Judges dissented, however, with Judge Starr finding "[t]he treatment of Dr. Goldman.... patently unconscionable." Goldman, supra, 739 F.2d at 659. Judge Starr reasoned that although "the judiciary is singularly ill-equipped to sit in judgment on military personnel regulations....the panel decision abdicates the judiciary's limited but important function in the extraordinarily delicate environment of military personnel." Id. at 658. Judges Ginsburg and Scalia concurred in Judge

Starr's dissent, stating that the Air Force regulation indicated "callous indifference" to Goldman's religious belief. Id. at 660.

This Court granted a writ of Certiorari. 53 U.S.L.W. 3881 (June 17, 1985).

SUMMARY OF ARGUMENT

Strict enforcement of AFR 35-10, by prohibiting Capt. Goldman from wearing a yarmulke indoors, severely restrains his Free Exercise rights. Such governmental action -- even by a military entity entitled to no little judicial deference -- is permitted only when the restraint fulfills two conditions: 1) it achieves a compelling interest; and 2) it achieves that interest in the least restrictive means possible. Thomas v. Review Board, 450 U.S. 707 (1981). Neither of those conditions is fulfilled in this case.

Moreover, this Court should not defer to military judgment concerning a uniform dress regulation that is demonstrably arbitrary, serves no substantive military purpose, and discriminates against Orthodox Jews.

ARGUMENT

THE FREE EXERCISE CLAUSE DOES NOT PERMIT THE AIR FORCE TO EXCLUDE ORTHODOX JEWS FROM AIR FORCE SERVICE

AFR 35-10 prohibits Air Force personnel from wearing "headgear" while indoors. Because petitioner sincerely holds the religious belief that he must keep his head covered at all times, strict enforcement of AFR 35-10 forces petitioner -- or any other Orthodox Jew -- to choose between adhering to his religious beliefs or serving his country in the Air Force. It is "a cruel choice," Braunfeld v. Brown, 366 U.S. 599, 616 (1961)(Stewart, J., dissenting).

See Sherbert v. Verner, 374 U.S. 398 (1963) (unconstitutional to force choice between following religious precepts and forfeiting government benefits).

Without question, military discipline demands some sacrifice of personal liberty by those who serve in the armed forces. If the Air Force had a compelling interest in enforcing AFR 35-10, that "cruel choice" might be inescapable for petitioner. But no such interest exists here. Strict enforcement of AFR 35-10 is no more than "[s]lavish devotion to arbitrary rules [and] is precisely the opposite of the spirit of accommodation which the Constitution, as interpreted by the Supreme Court, requires." Goldman v. Secretary of Defense, 739 F.2d 657, 659 (D.C. Cir. 1984)(Starr, J., dissenting from denial of petition for rehearing en banc).

A. Restrictions Of Free Exercise Rights Require Justification By The Least Restrictive Means of Achieving A Compelling Interest

Professor, later Chief Justice, Stone, writing in 1919, eloquently articulated the primary importance of respecting the religious beliefs of those who cannot comply with society's demands without violating their conscience:

> [B]oth morals and sound policy require that the state should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.

Stone, The Conscientious Objector, 21 Col. Univ. Q. 253, 269 (1919).

This respect for the integrity of individual conscience is no abstract principle; it is a fundament of our law, embodied in the Free Exercise Clause. This Court has recognized the primacy of the Free Exercise Clause by requiring that only paramount governmental interests will defeat claims arising under it.

1. Strict Scrutiny is the Standard for Judging Free Exercise Restraints

In an unbroken line of cases, this Court has consistently held that government may burden religious liberty only when such a burden "is essential to accomplish an overriding governmental interest." United States v. Lee, 455 U.S. 252, 257-58 (1982). In Thomas v. Review Board, 450 U.S. 707 (1981), Chief Justice Burger, quoting from his earlier opinion in Wisconsin v. Yoder, 406 U.S. 205 (1972), reaffirmed the Supreme Court's unwavering fidelity to the

strict scrutiny standard in Free Exercise cases:

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "[t]he essence of all that has been said and written on the subject is that only those interests of the highest order ... can overbalance legitimate claims to the free exercise of religion." Wisconsin v. Yoder, supra, 406 U.S. at 215.

Thomas v. Review Board, 450 U.S. at 718. Accord Gillette v. United States, 401 U.S. 437 (1971); Sherbert v. Verner, 374 U.S. 398 (1963).

2. Strict Scrutiny of Free Exercise Restraints Applies to Air Force Regulations

This Court has never addressed specifically what level of scrutiny it would apply to restraints on Free Exercise by the military. Both law and logic, however, de-

monstrate that the general rule of strict scrutiny should apply.*

First, as a matter of law, when the Court has addressed military restraints on other First Amendment rights, it has applied no lesser degree of scrutiny. In United States v. Robel, 389 U.S. 258 (1967), a Communist Party member challenged the constitutionality of the Subversive Activities Control Act of 1950, which provided, inter alia, that it was unlawful for Communist Party members to "engage in any employment in any defense facility." The Court acknowledged Congress' "power to safeguard [the country's] vital interests," id. at 267, by protecting the nation against spies and sab-

* None of the cases involving Free Exercise restraints by civilian government in any way support a military exception to the strict scrutiny rule. See United States v. Lee, supra; Thomas v. Review Board, supra; Wisconsin v. Yoder, supra; Gillette v. United States, supra; Sherbert v. Verner, supra.

oteurs, but nevertheless held the Act unconstitutional.

The Court reasoned that the means Congress chose to limit defense employees' mere membership in the Communist Party was unnecessarily restrictive:

> When legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal by means which have a "less drastic" impact on the continued vitality of First Amendment freedoms.

389 U.S. at 268.* See Shelton v. Tucker, 364 U.S. 479 (1960).

* Justice White dissented in Robel, primarily on the grounds that the majority weighed too lightly the government interest in keeping Communist party members from defense facilities. 389 U.S. at 284-85. (White, J., dissenting). Justice White did not disagree with the majority, however, with respect to the proper level of scrutiny. He noted that although the right of association is not absolute, "official interference with First Amendment rights has drawn close scrutiny." Id. at 283 (emphasis added).

The Court has also upheld military regulations when narrowly drawn and justified by compelling military interests. In Brown v. Glines, 444 U.S. 348 (1980), and Greer v. Spock, 424 U.S. 828 (1976), the Court rejected First Amendment challenges to regulations requiring that commanders approve petitions before circulation on an Air Force base (Brown) and political speeches and literature on an Army base (Greer).

In both cases, the Court stressed the importance of the military interests at stake and pointed out that the regulations restricted only speech that was reasonably necessary to protect those interests, speech that was "a clear danger to the loyalty, discipline or morale of troops," Greer, 424 U.S. at 840, or was "likely to interfere with [the] vital prerequisites for military

effectiveness," Brown, 444 U.S. at 354.* See also United States v. Albertini, 53 U.S.L.W. 4844, 4848 (June 24, 1985)(excluding holders of bar letters from military bases promotes "important governmental interest in assuring the security of military installations").

* Application of strict scrutiny in Brown and Greer is consistent with cases in which civilian authorities restricted Free Speech rights. In United States Civil Service Comm'n v. National Assoc. of Letter Carriers, 413 U.S. 548 (1973) and Broadrick v. Oklahoma, 413 U.S. 601 (1973), the Court upheld federal and state statutes regulating political activity by federal and state employees. In Broadrick, Justice White referred specifically to application of the strict scrutiny standard in First Amendment cases:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

Broadrick v. Oklahoma, 413 U.S. at 611-12 (citations omitted).

Second, as a matter of policy, military regulations that compel action contrary to religious conscience should be subject to the most exacting standard of judicial review. Underlying strict scrutiny is the Court's recognition of its special role as the guardian of citizens who depend upon fundamental constitutional rights as a bulwark against majoritarian tyranny. See United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938). The need for judicial vigilance does not stop at the military base gate.

To the extent that "the different character of the military community and of the military mission requires a different application of those protections," Parker v. Levy, 417 U.S. 733, 758 (1974), the strict scrutiny standard is sufficiently expansive to accommodate the special needs of the mil-

itary. The least restrictive alternative -- compelling state interest mode of analysis permits the military, in the right case, when its interests are held overriding, to prevail. See e.g., United States v. Albertini, supra; Brown v. Glines, supra; Greer v. Spock, supra. Because strict scrutiny permits proper deference to military purposes, there is no reason to exempt the Air Force from its searching judicial inquiry.

Despite this Court's consistent application of strict scrutiny to Free Exercise cases, the Court of Appeals below inexplicably rejected strict scrutiny and based its legal analysis in large part on Rostker v. Goldberg, 453 U.S. 57 (1981). Rostker, however, has no relevance to this case.

In Rostker, plaintiffs alleged gender-based discrimination. Here, petitioner alleges governmental restraint of

fundamental Free Exercise rights. In Rostker, the Court applied the less restrictive heightened scrutiny test for gender-based discrimination. See, e.g., Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981);. Craig v. Boren, 429 U.S. 190 (1976). Here, as demonstrated above, the well-established test for government restraint of Free Exercise rights is strict scrutiny. Although, like this case, Rostker arose in a military context, the salient feature of Rostker is that it involved gender-based discrimination for which a test more lenient than strict scrutiny has been held appropriate.

Rostker, then, is plainly not the general "standard of review ... designed for evaluating asserted clashes between individual rights and governmental powers ..." Goldman, 734 F.2d at 1536, that the Court of Appeals read it to be. Rather, Rostker is

simply the most recent in a line of cases utilizing heightened, but not strict, scrutiny to test gender-based discrimination. As such it is inapposite.*

B. The Air Force Cannot Demonstrate A Compelling Interest in AFR 35-10

To uphold AFR 35-10, this Court must find that forbidding Air Force personnel from wearing an unobstrusive yarmulke while indoors serves a compelling interest. Both the record evidence and relevant case law suggest otherwise.

* Even if Rostker did apply here, its rationale does not undercut petitioner's case. In Rostker, the Court held that Congress acted constitutionally when it authorized the draft registration only of men. The Court reached that conclusion primarily because Congress' decision to exempt women was carefully reasoned and deliberate, based on hearings, floor debate, and because "Congress specifically considered the question of the Act's constitutionality." 453 U.S. at 64.

In contrast, AFR 35-10 was promulgated without benefit of wide-ranging debate (Congressional or otherwise), nor was its constitutionality specifically considered. The deference accorded to the vigorously debated Congressional action in Rostker is wholly inappropriate to the administrative regulation at issue here.

1. The Air Force's only interest in AFR 35-10 is strict enforcement of its arbitrary style of dress uniformity

The Air Force advanced several specific arguments at trial in support of AFR 35-10.* The Disrict Court rejected all of them, and the Court of Appeals credited only the Air Force's interest dress uniformity.

* For example, the safety issue raised at trial -- that an unauthorized hat could fly into a jet engine and cause it to explode, Goldman, 734 F.2d at 1539 -- has little to do with this case, which concerns wearing a yarmulke indoors. In any event, the threat of flying yarmulkes is easily solved by a variety of fasteners. Cf. Menora v. Illinois High School Association, 683 F.2d 1030, 1035 (7th Cir. 1982)(constitutional challenge to rule forbidding basketball players from wearing headgear).

Another argument raised below, that the Air Force would be flooded with requests for myriad exceptions to uniform requirements, has no factual basis in the record. Although no one can know just how many persons would seek an exemption, it seems unlikely to be more than the number of Sabbatarians who claim the protection of Sherbert v. Verner, supra, or Thomas v. Review Board, supra. This argument is based on little more than idle speculation, hardly sufficient to constitute a compelling interest.

The Air Force's strict enforcement of its uniformity regulations serves the military interest of "identification and indoctrination into instinctive obedience" and fosters the teamwork, motivation and discipline necessary for an effective fighting force. Goldman, supra, 734 F.2d at 1540. Exceptions to its uniform requirements, the Air Force urges, would create resentment among those forced to adhere strictly to the regulations, thereby undermining morale. Id.

The particular provision of AFR 35-10 at issue -- permitting no yarmulke indoors -- serves no substantive military purpose in itself.* Rather, it is strict enforcement of a regulation to insure dress uniformity, regardless of the form the Air Force decides (even arbitrarily) that uniformity should take, which serves the military interest.

* The arbitrary nature of AFR 35-10 is discussed in detail in Section C, below.

2. The Air Force's strict enforcement of its arbitrary style of dress uniformity is not a compelling interest

Neither law nor logic permit strict enforcement of the Air Force's arbitrary style of dress uniformity to be deemed "an overriding governmental interest," United States v. Lee, supra, 455 U.S. at 257-58, sufficient to justify restraint on petitioner's Free Exercise rights. There is no bright line test for determining when a governmental interest becomes "compelling." But comparing the interests of uniformity in this case, with the interests at stake in those cases in which the Court has required deference to military judgment, illustrates vividly the relative triviality of the uniformity issue.

In Chappell v. Wallace, 103 S.Ct. 2362 (1983), the Court refused to provide enlisted military personnel a Bivens-type remedy against superior officers. Reasoning that such a legal remedy could not avoid

affecting the very foundation of military command, Chief Justice Burger stated that:

> the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel, would be underminded by a judicially created remedy exposing officers to personal liability at the hands of those they are charged to command.

103 S.Ct. at 2367.

The obvious and direct threat to a critical element of military life -- chain of command -- in Chappell, contrasts sharply with the tenuous connection between wearing a yarmulke and undermining discipline, as claimed in this case. That tenuous connection attenuates even further in light of the record evidence that petitioner wore a yarmulke, without any incidents of resentment by fellow officers or enlisted personnel or objections by superiors, for over three years. Goldman, supra, 739 F.2d at 1533 (Starr, J., dissenting).

Also instructive is Parker v. Levy, 417 U.S. 733 (1974). There, an Army captain, who was a physician, was court-martialed for disobeying orders and for "conduct unbecoming an officer and a gentleman." The Court upheld the court-martial, holding that, in the military context, the regulations under which Captain Levy was tried were not unconstitutionally vague or over-broad. In reaching its decision, the Court noted that:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.

417 U.S. at 758 (emphasis supplied). The inapplicability to this case of Justice

Rehnquist's reasoning in Parker becomes apparent upon close comparison of the facts in both cases.

Both this case and Parker involve a captain working in a hospital who disobeyed a superior's order. There, the similarity ends. In Parker, the captain refused to perform his assigned duty of conducting a dermatological clinic for other soldiers. Here, petitioner received outstanding evaluations of his work. In Parker, the captain made public statements that promoted "disloyalty and disaffection among the troops." 417 U.S. at 738. Here, petitioner's very job involved ministering to his fellow soldiers' health, seeking to make them better, more effective soldiers.

In Parker, Justice Rehnquist emphasized that "fundamental" military interests may outweigh First Amendment rights.

The Court held that Captain Levy -- by neglecting his duties and counselling disloyalty -- may have materially threatened such "fundamental" military interests. To suggest, here, however, that Captain Goldman's wearing a yarmulke in violation of uniform regulations similarly threatened fundamental military interests is contrary to common sense. The Air Force's interest in enforcement of its particular style of dress uniformity is simply not "overriding" or an "interest of the highest order." Wisconsin v. Yoder, supra, 406 U.S. at 715.*

* Captain Goldman is also in quite a different position from the physician who unsuccessfully challenged the Army's refusal to grant him an officer's commission because he refused information as to his membership in allegedly subversive organizations in Orloff v. Willoughby, 345 U.S. 83 (1953). Nor does petitioner suggest the kind of radical alteration of the military command structure sought by plaintiffs, and rejected by the Court, in Gilligan v. Morgan, 413 U.S. 1 (1973). The kinds of compelling interests in Orloff (the need for loyal officers) and Gilligan (the need for military control over troop mobilization) are qualitatively different from the interest of dress uniformity present in this case.

Kelley v. Johnson, 425 U.S. 238 (1976) and United States v. Lee, 455 U.S. 252 (1982), which the Solicitor General cited as authority in his Brief in Opposition to Petition for a Writ of Certiorari at 4-10, do not dictate a different conclusion.

In Kelley the Court upheld as constitutional grooming standards for policemen, which, as here "ultimately reduced to uniformity for uniformity's sake." 425 U.S. at 243. But there are two distinctions which make Kelley inapposite to this case.

First, Kelley did not involve a fundamental First Amendment right, but rather a claim based on a Fourteenth Amendment "liberty" interest in "matters of personal appearance." 425 U.S. at 244. Such an interest does not demand the same strict scrutiny required for restraint of a Free exer-

cise right. Second, Kelley involved a police force, not the military. Justice Rehnquist pointed out specifically that cases involving the "unique judicial deference" accorded to the military were inapposite in Kelley, 425 U.S. at 246. Accordingly, Kelley does not control this case.

In United States v. Lee, a member of an Amish group sought an exception from the social security tax on employees, claiming that imposition of social security taxes violated his Free Exercise rights. The Court, applying strict scrutiny, held that because "the broad public interests in maintaining a sound tax system is of such high order," the Free Exercise rights must yield. 455 U.S. at 259-60. The Court pointed out that, unlike Wisconsin v. Yoder, permitting religious exceptions to the tax code "would be difficult to accommodate" and would "ra-

dically restrict the operating latitude of the legislature." Id. at 259.

The far-ranging implications of accommodation in Lee are not present in this case, as they were not in Yoder. A threat to the proper operation of the tax system strikes at the heart of the nation's ability to function -- a more compelling interest could hardly be imagined. A minor exception to an Air Force uniform regulation hardly strikes at the heart of the Air Force's ability to function -- as petitioner's more than three years of wearing a yarmulke without incident demonstrates.

The analytical thread running through these cases -- Chappell, Parker, Orloff, Gilligan and Lee -- is strikingly clear. When a fundamental First Amendment right interferes with a compelling govern-

mental interest, that First Amendment right must give way. But those interests must be "of the highest order," and it does violence to the language and intent of these cases to include enforcement of the Air Force's arbitrary style of dress uniformity as such a compelling interest.

C. AFR 35-10 Is Not The Least Restrictive Means of Achieving Uniformity

Assuming, arguendo, that strict enforcement of dress uniformity were deemed a compelling interest, the Air Force must still demonstrate that AFR 35-10 is "the least restrictive means of achieving" that uniformity. Thomas v. Review Board, supra, 450 U.S. at 718. See United States v. Robel, 389 U.S. 258, 268 (1967). The Air Force has made no such demonstration.

AFR 35-10 already allows visible deviations from total uniformity, permitting visible rings and bracelets of non-uniform

design, as well as non-uniform undergarments and ornaments that are not visible (such as a Masonic ring or a crucifix worn under a shirt). Goldman, supra, 734 F.2d at 1540. Therefore, permitting petitioner to wear an unobtrusive yarmulke would not entail abandoning a rule of absolute dress uniformity, but merely an incremental broadening in the scope of deviation from uniformity already permitted. Such a minor shift in the scope of deviation from uniformity -- strictly enforced, of course -- would not affect AFR 35-10's purpose of enforcing uniformity.

The current regulation is thus more restrictive than necessary to achieve its purpose. The Air Force can achieve its purpose of enforcing AFR 35-10 and still accommodate petitioner's Free Exercise rights by a minor adjustment of its arbitrary rule. If Air Force regulations currently permit non-uniform, visible rings and bracelets,

surely the proper functioning of the Air Force could withstand petitioner's unobtrusive yarmulke.*

The Air Force offers no reason why its uniform dress regulations should permit visible, non-uniform rings and bracelets, but not yarmulkes. According to the Court of Appeals, that absence of a reasoned basis is irrelevant, because Air Force regulations are "necessarily arbitrary." Id. The Court of Appeals concludes that the Air Force's judgment, in permitting some exceptions to total uniformity, "is entitled to deference" despite its arbitrariness and lack of rational basis "because it is within its expertise and outside ours." Id.

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* The Air Force argues that amending AFR 35-10 to permit yarmulkes will cause significant problems of morale and discipline. The Air Force treats this case as if the only issue involved were the propriety of granting exemptions. But that is not necessarily so, as the Solicitor General observed in his (cont'd)

The Air Force's unwillingness to move its arbitrary, and unnecessarily restrictive, line of dress uniformity slightly so as to include yarmulkes is wholly without reasoned basis. It is impossible to improve

(cont'd)
Brief for the United States as Amicus Curiae in Jensen v. Quaring, 53 U.S.L.W. 4787 (U.S. June 17, 1985)(per curiam). In his brief, arguing that the State of Nebraska need not grant an exception to one person who did not want her photograph taken for a drivers license, the Solicitor General stated:

> If the State can accomplish its objective equally well by adopting a less restrictive alternative applicable to the populace as a whole, then it may be appropriate to require the State to adopt that alternative in the case of a particular plaintiff.

Brief for the United States at 3.

In this case, the Air Force "can accomplish its objective equally well" by, for example, requiring all personnel to wear hats indoors (as AFR 35-10 now requires security personnel to do). Uniformity of dress will be served, and petitioner accommodated.

upon Judge Starr's argument in response below:

> The panel ... justifies this manifest infringement of First Amendment liberty by the military's need for uniform adherence to an admittedly arbitrary rule .... The military's claim that flexibility generates resentment, whereas arbitrariness keeps the corps content, is utterly belied by Dr. Goldman's own experience .... Not a scintilla of evidence in the record suggests that his wearing of a yarmulke caused any resentment whatever in others .... The claim is contradicted by expert testimony credited by the trial court, that making exceptions to accommodate deeply held religious beliefs would defuse rather than cause resentment. The claim is also at odds with common sense. Reasonable servicemen would more justly be annoyed with the mechanical enforcement of arbitrary rules that prevent the wearing of such unobstrusive symbols of religious faith while allowing others to wear religious rings and bracelets. The vice inherent in an arbitrary rule of this kind is that it does not offer to one who falls on the wrong side of the line any reason for the disparate treatment from which he or she suffers.

Goldman, supra, 739 F.2d at 659 (Starr, J., dissenting) (emphasis in original).*

* As Judge Starr points out, the Air Force's resentment argument is counter-intuitive. The common sense response that Judge Starr advances is echoed, albeit in a fictional work, by Pulitzer Prize winning author William Styron, who chronicles in a soon to be published novel the non-regulation idosyncracies of a Marine Corps Colonel:

> Both the Jerry Colonna moustache and the [silver-inlaid Colt .38] revolver were nonregulation; moustaches were allowed but they should not be recherche, and the standard issue sidearm was a .45 automatic. The automatic, it was commonly noted, was not really reliable, and hard to aim (though once aimed it could pulverize an ox). But it was less for this reason that Halloran sported his more glamorous sidearm -- and the flamboyant handlebar -- than the dash and style to which his status as a legend entitled him. The Marine Corps is rigorous, even Prussian, in many of its fetish-like requirements, but there is something affectingly lackadaisical in its tolerance of reasonable eccentricities shown by favored oddballs; unlike the Prussians, the Marines, thanks to this good-natured view, have been helped in saving themselves from dementia.

W. Styron, Love Day, 104 Esquire 98 (August, 1985).

D. This Court Should Not Defer To Arbitrary Restraints on Free Exercise Rights that Discriminate Against Orthodox Jews

As noted above, the Court of Appeals panel ruled that it must defer to military regulations concerning military discipline, even if arbitrary, merely because such judgments serve some purported military interest. The Court of Appeals rationale is dangerous in the extreme.

First, deference to an admittedly arbitrary regulation is tantamount to abdication of "the judiciary's limited but important function in the extraordinarily delicate environment of military personnel." Goldman, supra, 739 F.2d. at 658 (Starr, J. dissenting). If the Air Force decided that teamwork, motivation, discipline and the like would be served not simply by uniform dress, but by uniform religion -- would that judgment be entitled to deference? If the

Air Force decided that its military effectiveness would be enhanced by having only white officers -- would that judgment be entitled to deference?

Second, deference to a purely arbitrary dress regulation, the content of which is justified solely by the need for some (perhaps, any) dress regulation, would constitute an unconstitutional religious gerrymander in this case. Although, on its face, AFR 35-10 is not explicitly discriminatory, it effectively prohibits Orthodox Jews from wearing yarmulkes. AFR 35-10 permits, however, Christians to wear religious ornaments under their shirts (such as a crucifix), or Masons to wear Masonic rings.

AFR 35-10, then, works a de facto discrimination against Orthodox Jews. When government actions, however unintentionally, draw lines which burden Free Exercise

government must be able to demonstrate "a neutral, secular basis for the lines [it] has drawn," Gillette v. United States, 401 U.S. 437, 452 (1971). Because the Air Force makes no such showing here, AFR 35-10 is an unconstitutional religious gerrymander.*

* Accommodation of petitioner's Free Exercise right here will not constitute a prohibited establishment of religion. The constitutionally mandated concern for religious liberty embodied in the Free Exercise Clause permits government to adjust its regulations in appropriate circumstances to prohibit discrimination against the religions practices of minorities. See Estate of Thornton v. Caldor, Inc., 53 U.S.L.W. 4853, 4856 (June 26, 1985)(O'Connor, J., concurring); Sherbert v. Verner, 374 U.S. at 409.

CONCLUSION

AFR 35-10 tells Orthodox Jews that they are unwelcome in the Air Force. The interest this regulation serves -- strict enforcement of uniformity -- is hardly sufficiently compelling to override petitioner's Free Exercise right. Amici urge the Court to hold unconstitutional the wholly arbitrary line drawing of AFR 35-10 that permits the Air Force, without reason, to reject the patriotic desires of Orthodox Jews who seek to serve their country.

The judgment of the United States Court of Appeals for the District of Columbia Circuit should be reversed.

Respectfully submitted,

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